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Attorneys for Defendant  
LIBERTY LIFE ASSURANCE COMPANY OF  
BOSTON

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ANITA B. CARR,

Plaintiff,

v.

LIBERTY LIFE ASSURANCE  
COMPANY; PROVIDIAN BANCORP  
SERVICES,

Defendants.

CASE NO. C 05-3190 BZ

**DEFENDANT LIBERTY LIFE  
ASSURANCE COMPANY OF BOSTON'S  
ANSWER TO PLAINTIFF'S FIRST  
AMENDED COMPLAINT**

Defendant Liberty Life Assurance Company of Boston ("Liberty Life") in answer to the First Amended Complaint of plaintiff Anita B. Carr ("Carr") on file herein, and to each and every cause of action contained therein, admits, denies and alleges as follows:

**I. PARTIES, JURISDICTION AND VENUE**

1. Answering the allegations contained in paragraph 1, Liberty Life admits upon information and belief that Carr is a resident of Alameda County.

2. Answering the allegations contained in paragraph 2, Liberty Life admits the allegations contained therein.

3. Answering the allegations contained in paragraph 3, Liberty Life admits defendant Providian Bancorp Services ("Providian") is the ERISA Plan Administrator for the Providian

1 Financial Health Plan. Liberty Life further admits upon information and belief that Providian is  
2 based in San Francisco, California.

3 4. Answering the allegations contained in paragraph 4, Liberty Life admits on  
4 information and belief the allegations contained therein.

5 5. Answering the allegations contained in paragraph 5, Liberty Life denies the  
6 allegations contained therein on the ground the action is governed by ERISA, 29 U.S.C. §1001 *et*  
7 *seq.*, and is subject to the exclusive remedies provided thereunder.

8 6. Answering the allegations contained in paragraph 6, Liberty Life admits  
9 jurisdiction is proper in the Northern District of California.

10 7. Answering the allegations contained in paragraph 7, Liberty Life admits this action  
11 is governed by ERISA, 29 U.S.C. §1001 *et seq.*

## 12 II. FACTUAL ALLEGATIONS

13 1. Answering the allegations contained in paragraph 1, there are no allegations  
14 alleged in this paragraph.

15 2. Answering the allegations contained in paragraph 2, Liberty Life admits on  
16 information and belief that Carr was employed by Providian from October of 1998 to August 28,  
17 2001. Liberty Life further admits that Exhibit 1 to plaintiff's complaint is a complete copy of  
18 Liberty Life's claim file, with the exception of 4 pages – a cover page to Carr's personnel file, a  
19 copy of D'Anne Gleicher's business card, the first page of an Activities Questionnaire completed  
20 by Carr and a letter to Carr from Marcia Eley dated March 22, 2002, and a surveillance DVD.

21 3. Answering the allegations contained in paragraph 3, Liberty Life admits on  
22 information and belief that Carr was employed by Providian as a director of data services and  
23 earned approximately \$135,000 annually. As to the remaining allegations, Liberty Life denies the  
24 allegations contained therein.

25 4. Answering the allegations contained in paragraph 4, Liberty Life denies the  
26 allegations contained therein.

27 5. Answering the allegations contained in paragraph 5, Liberty Life admits Carr's  
28 treating physician, Rajiv Dixit, M.D., diagnosed her with fibromyalgia and Sjögren's Syndrome.

1 As to the remaining allegations, Liberty Life denies the allegations contained therein.

2 6. Answering the allegations contained in paragraph 6, Liberty Life denies the  
3 allegations contained therein.

4 7. Answering the allegations contained in paragraph 7, Liberty Life denies Carr paid  
5 long term disability policy premiums to Liberty Life. As to the remaining allegations, Liberty  
6 Life denies the allegations contained therein as an inaccurate and incomplete summary of the  
7 Group Disability Income Policy ("Policy"), which speaks for itself.

8 8. Answering the allegations contained in paragraph 8, Liberty Life denies each and  
9 every allegation contained therein as an inaccurate and incomplete summary of Carr's pay check  
10 stubs, which speak for themselves.

11 9. Answering the allegations contained in paragraph 9, Liberty Life denies the  
12 allegations contained therein.

13 10. Answering the allegations contained in paragraph 10, Liberty Life denies the  
14 allegations contained therein.

15 11. Answering the allegations contained in paragraph 11, Liberty Life admits upon  
16 information and belief that Carr was laid off from Providian on or around August 28, 2001 and  
17 that she signed a severance agreement in conjunction therewith. As to the remaining allegations,  
18 Liberty Life denies each and every allegation contained therein as an inaccurate and incomplete  
19 summary of the severance agreement, which speaks for itself.

20 12. Answering the allegations contained in paragraph 12, Liberty Life denies each and  
21 every allegation contained therein as an inaccurate and incomplete summary of the severance  
22 agreement, which speaks for itself.

23 13. Answering the allegations contained in paragraph 13, Liberty Life admits Carr  
24 received \$36,000 pursuant to the severance agreement, which speaks for itself. As to the  
25 remaining allegations, Liberty Life denies each and every allegation contained therein.

26 14. Answering the allegations contained in paragraph 14, Liberty Life denies the  
27 allegations contained therein.

28 15. Answering the allegations contained in paragraph 15, Liberty denies the

1 allegations contained therein.

2 16. Answering the allegations contained in paragraph 16, Liberty Life denies the  
3 allegations contained therein.

4 17. Answering the allegations contained in paragraph 17, Liberty Life denies the  
5 allegations contained therein.

6 18. Answering the allegations contained in paragraph 18, Liberty Life denies the  
7 allegations contained therein as an inaccurate and incomplete summary of the severance  
8 agreement, which speaks for itself.

9 19. Answering the allegations contained in paragraph 19, Liberty Life denies the  
10 allegations contained therein as an inaccurate and incomplete summary of the policy, which  
11 speaks for itself.

12 20. Answering the allegations contained in paragraph 20, Liberty Life denies the  
13 allegations contained therein as an inaccurate and incomplete summary of the policy, which  
14 speaks for itself.

15 21. Answering the allegations contained in paragraph 21, Liberty Life admits on  
16 information and belief that Carr was awarded Social Security Disability Benefits in the amount of  
17 \$1509.00 per month on or about September 27, 2003.. As to the remaining allegations, Liberty  
18 Life denies the allegations contained therein.

19 22. Answering the allegations contained in paragraph 22, Liberty Life denies each and  
20 every allegation contained therein.

21 23. Answering the allegations contained in paragraph 23, Liberty Life admits on  
22 information and belief that Carr will reach the age of 65 on or about October 16, 2014. As to the  
23 remaining allegations, Liberty Life denies each and every allegation contained therein.

24 24. Answering the allegations contained in paragraph 24, Liberty Life denies each and  
25 every allegation contained therein.

26 25. Answering the allegations contained in paragraph 25, Liberty Life denies each and  
27 every allegation contained therein.

28 26. Answering the allegations contained in paragraph 26, Liberty Life admits Carr

1 submitted a claim for disability income benefits under the Policy issued by Liberty Life to  
2 Providian on or around November 29, 2001. Liberty Life further admits it denied Carr's claim on  
3 or around January 22, 2002.

4 27. Answering the allegations contained in paragraph 27, Liberty Life admits Carr  
5 appealed the denial of her claim for long term disability benefits on or around March 15, 2002.  
6 Liberty Life further admits it upheld the denial on or around April 29, 2002.

7 28. Answering the allegations contained in paragraph 28, Liberty Life admits Carr  
8 purported to submit another claim for disability benefits on or around July 28, 2003, which was  
9 denied by Liberty Life on or around November 17, 2003.

10 29. Answering the allegations contained in paragraph 29, Liberty Life admits Carr  
11 appealed the denial on or around December 14, 2004. Liberty Life further admits Carr submitted  
12 additional documentation with her appeal, which speak for themselves. As to the remaining  
13 allegations, Liberty Life denies each and every allegation contained therein.

14 30. Answering the allegations contained in paragraph 30, Liberty Life admits it upheld  
15 the denial of Carr's claim on or around January 28, 2005.

16 31. Answering the allegations contained in paragraph 31, Liberty Life admits on  
17 information and belief that on or around August 29, 2001, Carr's primary treating provider was  
18 Carol L. Lamb, M.D.

19 32. Answering the allegations contained in paragraph 32, Liberty Life admits on or  
20 around January 3, 2002 it received an Attending Physician's Statement completed by Dr. Lamb.  
21 As to the remaining allegations, Liberty Life denies each and every allegation contained therein  
22 as an inaccurate and incomplete summary of the Attending Physician's Statement, which speaks  
23 for itself.

24 33. Answering the allegations contained in paragraph 33, Liberty Life admits Dr.  
25 Lamb found Carr had no physical limitations. As to the remaining allegations, Liberty Life  
26 denies each and every allegation contained therein.

27 34. Answering the allegations contained in paragraph 34, Liberty Life admits on  
28 information and belief that Dr. Lamb referred Carr to Dr. Dixit, a rheumatologist, on or around

1 October 2001.

2 35. Answering the allegations contained in paragraph 35, Liberty Life denies each and  
3 every allegation contained therein.

4 36. Answering the allegations contained in paragraph 36, Liberty Life admits Dr.  
5 Lamb wrote a letter dated October 1, 2004. As to the remaining allegations, Liberty Life denies  
6 each and every allegation contained therein as an inaccurate and incomplete summary of the  
7 letter, which speaks for itself.

8 37. Answering the allegations contained in paragraph 37, Liberty Life denies each and  
9 every allegation contained therein as an inaccurate and incomplete summary of Dr. Lamb's  
10 October 1, 2004 letter, which speaks for itself.

11 38. Answering the allegations contained in paragraph 38, Liberty Life admits on  
12 information and belief that Carr first saw Dr. Dixit on October 24, 2001. Liberty Life further  
13 admits Dr. Dixit diagnosed Carr with Sjögren's Syndrome, fibromyalgia syndrome and  
14 hypertension. As to the remaining allegations, Liberty Life denies each and every allegation  
15 contained therein.

16 39. Answering the allegations contained in paragraph 39, Liberty Life denies each and  
17 every allegation contained therein.

18 40. Answering the allegations contained in paragraph 40, Liberty Life denies each and  
19 every allegation contained therein as an inaccurate and incomplete summary of Dr. Dixit's March  
20 26, 2003 report, which speaks for itself.

21 41. Answering the allegations contained in paragraph 41, Liberty Life denies each and  
22 every allegation contained therein as an inaccurate and incomplete summary of Dr. Dixit's  
23 September 2, 2004 report, which speaks for itself.

24 42. Answering the allegations contained in paragraph 42, Liberty Life admits on  
25 information and belief that Carr saw Robert Bennett, M.D. on or about April 13, 2004.

26 43. Answering the allegations contained in paragraph 43, Liberty Life admits on  
27 information and belief that Dr. Bennett is a rheumatologist. As to the remaining allegations,  
28 Liberty Life denies each and every allegation contained therein.



1           44.     Answering the allegations contained in paragraph 44, Liberty Life denies each and  
2 every allegation contained therein as an inaccurate and incomplete summary of Dr. Bennett's  
3 April 14, 2004 report, which speaks for itself.

4           45.     Answering the allegations contained in paragraph 45, Liberty Life denies each and  
5 every allegation contained therein as an inaccurate and incomplete summary of Dr. Bennett's  
6 April 14, 2004 report, which speaks for itself.

7           46.     Answering the allegations contained in paragraph 46, Liberty Life denies each and  
8 every allegation contained therein as an inaccurate and incomplete summary of Dr. Bennett's  
9 April 14, 2004 report, which speaks for itself.

10          47.     Answering the allegations contained in paragraph 47, Liberty Life admits  
11 Theodore Becker, Ph.D., RPT evaluated Carr on or about May 4, 2004. As to the remaining  
12 allegations, Liberty Life denies each and every allegation contained therein.

13          48.     Answering the allegations contained in paragraph 48, Liberty Life denies each and  
14 every allegation contained therein as an inaccurate and incomplete summary of Dr. Becker's  
15 report, which speaks for itself.

16          49.     Answering the allegations contained in paragraph 49, Liberty Life denies each and  
17 every allegation contained therein as an inaccurate and incomplete summary of Dr. Becker's  
18 report, which speaks for itself.

19          50.     Answering the allegations contained in paragraph 50, Liberty Life denies each and  
20 every allegation contained therein as an inaccurate and incomplete summary of Dr. Becker's  
21 report, which speaks for itself.

22          51.     Answering the allegations contained in paragraph 51, Liberty Life denies each and  
23 every allegation contained therein as an inaccurate and incomplete summary of Dr. Becker's  
24 report, which speaks for itself.

25          52.     Answering the allegations contained in paragraph 52, Liberty Life denies each and  
26 every allegation contained therein as an inaccurate and incomplete summary of Dr. Becker's  
27 report, which speaks for itself.

28          53.     Answering the allegations contained in paragraph 53, Liberty Life denies each and

every allegation contained therein as an inaccurate and incomplete summary of Dr. Becker's report, which speaks for itself.

54. Answering the allegations contained in paragraph 54, Liberty Life denies each and every allegation contained therein as an inaccurate and incomplete summary of Dr. Becker's report, which speaks for itself.

55. Answering the allegations contained in paragraph 55, Liberty Life admits Carr was evaluated by Jay M. Uomoto, Ph.D. As to the remaining allegations, Liberty Life denies each and every allegation contained therein.

56. Answering the allegations contained in paragraph 56, Liberty Life admits on information and belief that Dr. Uomoto is a licensed psychologist. As to the remaining allegations, Liberty Life denies the allegations contained therein.

57. Answering the allegations contained in paragraph 57, Liberty Life admits on information and belief the allegations contained therein.

58. Answering the allegations contained in paragraph 58, Liberty Life denies each and every allegation contained therein as an inaccurate and incomplete summary of Dr. Uomoto's May 7, 2004 report, which speaks for itself.

59. Answering the allegations contained in paragraph 59, Liberty Life denies each and every allegation contained therein as an inaccurate and incomplete summary of Dr. Uomoto's May 7, 2004 report, which speaks for itself.

60. Answering the allegations contained in paragraph 60, Liberty Life denies each and every allegation contained therein as an inaccurate and incomplete summary of Dr. Uomoto's May 7, 2004 report, which speaks for itself.

61. Answering the allegations contained in paragraph 61, Liberty Life admits on information and belief that Carr was evaluated by Donald Usan, MA, MBA on or about May 5, 2004. As to the remaining allegations, Liberty Life denies each and every allegation contained therein.

62. Answering the allegations contained in paragraph 62, Liberty Life denies the allegations contained therein as an inaccurate and incomplete summary of Mr. Usan's report,



1 which speaks for itself.

2 63. Answering the allegations contained in paragraph 63, Liberty Life denies each and  
3 every allegation contained therein as an inaccurate and incomplete summary of Mr. Uslan's  
4 report, which speaks for itself.

5 64. Answering the allegations contained in paragraph 64, Liberty Life denies each and  
6 every allegation contained therein as an inaccurate and incomplete summary of Mr. Uslan's  
7 report, which speaks for itself.

8 65. Answering the allegations contained in paragraph 65, Liberty Life denies each and  
9 every allegation contained therein as an inaccurate and incomplete summary of Mr. Uslan's  
10 report, which speaks for itself.

11 66. Answering the allegations contained in paragraph 66, Liberty Life admits on  
12 information and belief that Carr's family and friends have written personal statements on Carr's  
13 behalf. As to the remaining allegations, Liberty Life denies each and every allegation contained  
14 therein as an inaccurate and incomplete summary of these written statements, which speak for  
15 themselves.

16 67. Answering the allegations contained in paragraph 67, Liberty Life denies each and  
17 every allegation contained therein as an inaccurate and incomplete summary of Amy Chernay's  
18 letter, which speaks for itself.

19 68. Answering the allegations contained in paragraph 68, Liberty Life denies each and  
20 every allegation contained therein as an inaccurate and incomplete summary of Ellen Hancock's  
21 letter, which speaks for itself.

22 69. Answering the allegations contained in paragraph 69, Liberty Life denies each and  
23 every allegation contained therein as an inaccurate and incomplete summary of Elena Carr's  
24 letter, which speaks for itself.

25 70. Answering the allegations contained in paragraph 70, Liberty Life admits on  
26 information and belief that Carr wrote a letter dated October 8, 2004, which speaks for itself. As  
27 to the remaining allegations, Liberty Life denies the allegations contained therein.

28 71. Answering the allegations contained in paragraph 71, Liberty Life denies the

1 allegations contained therein

2 72. Answering the allegations contained in paragraph 72, Liberty Life denies each and  
3 every allegation contained therein.

4 73. Answering the allegations contained in paragraph 73, Liberty Life denies each and  
5 every allegation contained therein.

6 74. Answering the allegations contained in paragraph 74, Liberty Life denies the  
7 allegations contained therein.

8 75. Answering the allegations contained in paragraph 75, Liberty Life admits on  
9 information and belief that Providian's in house counsel, D'Anne L. Gleicher, wrote a letter to  
10 Carr's counsel on or about March 14, 2005. As to the remaining allegations, Liberty Life denies  
11 each and every allegation contained therein as an inaccurate and incomplete summary of this  
12 letter, which speaks for itself.

### 13 III. ESTOPPEL

14 1. Answering the allegations contained in paragraph 1, Liberty Life denies the  
15 allegations contained therein.

16 2. Answering the allegations contained in paragraph 2, Liberty Life denies the  
17 allegations contained therein.

18 3. Answering the allegations contained in paragraph 3, Liberty Life admits it  
19 accepted premiums from Providian for the Group Disability Income policy.

20 4. Answering the allegations contained in paragraph 4, Liberty Life denies each and  
21 every allegation contained therein.

22 5. Answering the allegations contained in paragraph 5, Liberty Life denies each and  
23 every allegation contained therein.

24 6. Answering the allegations contained in paragraph 6, Liberty Life denies each and  
25 every allegation contained therein.

26 7. Answering the allegations contained in paragraph 7, Liberty Life denies that its  
27 conduct was misleading.

28 8. Answering the allegations contained in paragraph 8, Liberty Life denies each and

every allegation contained therein.

#### IV. RIGHT TO BENEFITS UNDER ERISA

Liberty Life admits and denies each of the allegations contained above as though fully set forth herein, and incorporates the same by reference.

1. Answering the allegations contained in paragraph 1, Liberty Life admits the long term disability policy at issue is governed by ERISA.

2. Answering the allegations contained in paragraph 2, Liberty Life denies each and every allegation contained therein.

3. Answering the allegations contained in paragraph 3, Liberty Life denies each and every allegation contained therein.

4. Answering the allegations contained in paragraph 4, Liberty Life denies each and every allegation contained therein.

5. Answering the allegations contained in paragraph 5, Liberty Life admits each and every allegation contained therein.

#### V. CONTRACT DEFENSES SUPPORTING DECLARATORY JUDGMENT INVALIDATING THE SEVERANCE AGREEMENT

Liberty Life admits and denies each of the allegations contained above as though fully set forth herein, and incorporates the same by reference.

1. Answering the allegations contained in paragraph 1, Liberty Life denies the allegations contained therein.

2. Answering the allegations contained in paragraph 2, Liberty Life denies the allegations contained therein.

3. Answering the allegations contained in paragraph 3, Liberty Life denies the allegations contained therein.

4. Answering the allegations contained in paragraph 4, Liberty Life denies the allegations contained therein.

5. Answering the allegations contained in paragraph 5, Liberty Life denies the allegations contained therein.

6. Answering the allegations contained in paragraph 6, Liberty Life denies the allegations contained therein.

7. Answering the allegations contained in paragraph 7, Liberty Life denies the allegations contained therein.

### **FIRST AFFIRMATIVE DEFENSE**

#### **(Failure to State a Claim)**

AS A FIRST, SEPARATE AND AFFIRMATIVE DEFENSE TO THE COMPLAINT ON FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION CONTAINED THEREIN, this answering defendant alleges that said complaint fails to state facts sufficient to constitute a cause of action against this answering defendant.

### **SECOND AFFIRMATIVE DEFENSE**

#### **(No Coverage/Barred by Terms and Conditions)**

AS A SECOND, SEPARATE AND AFFIRMATIVE DEFENSE TO THE COMPLAINT ON FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION CONTAINED THEREIN, this answering defendant alleges that the claims alleged against defendant, in whole or in part, do not fall within the scope of the coverage or are barred by the terms, conditions, definitions, exclusions, and the limitations contained in the group disability income policy issued by this answering defendant.

### **THIRD AFFIRMATIVE DEFENSE**

#### **(Conditions Precedent)**

AS A THIRD, SEPARATE AND AFFIRMATIVE DEFENSE TO THE COMPLAINT ON FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION CONTAINED THEREIN, this answering defendant alleges that at all times and places mentioned in the complaint herein, Carr failed to perform certain conditions precedent to the duty of defendant. These conditions precedent were imposed upon Carr by contract. The non-performance of said conditions excused defendant's obligations under the contract and has given defendant the right of disaffirmance, rescission and release; Carr is therefore barred from recovery herein.

**FOURTH AFFIRMATIVE DEFENSE****(Liberty Life's Conduct Not Arbitrary or Capricious)**

AS A FOURTH, SEPARATE AND AFFIRMATIVE DEFENSE TO THE COMPLAINT ON FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION CONTAINED THEREIN, this answering defendant alleges that its conduct was not arbitrary or capricious.

**FIFTH AFFIRMATIVE DEFENSE****(Prior Settlement and Release)**

AS A FIFTH, SEPARATE AND AFFIRMATIVE DEFENSE TO THE COMPLAINT ON FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION CONTAINED THEREIN, this answering defendant alleges on information and belief that the causes of action asserted herein were settled, satisfied, extinguished and supported by adequate consideration prior to the serving of this lawsuit on these defendants, and the prior settlement operates to bar the same.

**SIXTH AFFIRMATIVE DEFENSE****(Accord and Satisfaction)**

AS A SIXTH, SEPARATE AND AFFIRMATIVE DEFENSE TO THE COMPLAINT ON FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION CONTAINED THEREIN, this answering defendant alleges on information and belief that the causes of action asserted herein were settled, satisfied and released, and an accord of all claims reached, and the prior settlement operates to bar plaintiff's complaint.

**SEVENTH AFFIRMATIVE DEFENSE****(Plaintiff not a Covered Person under the Policy)**

AS A SEVENTH, SEPARATE AND AFFIRMATIVE DEFENSE TO THE COMPLAINT ON FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION CONTAINED THEREIN, this answering defendant alleges that plaintiff's claims against Liberty Life are barred because plaintiff was no longer covered under the policy at the time of her alleged disability.

Ropers Majeski Kohn & Bentley  
A Professional Corporation  
Redwood City

1 WHEREFORE, this answering defendant prays for judgment as follows:

- 2 1. That plaintiff take nothing by her complaint;
- 3 2. For costs of suit incurred herein;
- 4 3. For attorneys' fees, and
- 5 4. For such other and further relief as the Court deems proper.

6 Dated: October 14, 2005

ROPERS, MAJESKI, KOHN & BENTLEY

7  
8 By: Kathryn C. Curry

9 PAMELA E. COGAN  
10 KATHRYN C. CURRY  
11 ERIN A. CORNELL  
12 Attorneys for Defendant  
13 LIBERTY LIFE ASSURANCE  
14 COMPANY OF BOSTON

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